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12 UNITED STATES DISTRICT COURT  
13 CENTRAL DISTRICT OF CALIFORNIA  
14 SOUTHERN DIVISION

15 INNOVATIVE SPORTS MANAGEMENT,  
16 INC.,

17 Plaintiff,

18 vs.

19 RENZO MACCHIAVELLO, et al.,

20 Defendants.

Case No. 8:12-cv-01748-TJH-PLA

PLAINTIFF'S OPPOSITION TO  
DEFENDANTS' MOTION FOR  
JUDGMENT ON THE PLEADINGS;  
MEMORANDUM OF POINTS AND  
AUTHORITIES

Date: October 1, 2013

Time: 9:00 a.m.

Place: Courtroom 17

Judge: Honorable Terry J. Hatter, Jr.

21 TO THE HONORABLE COURT, THE DEFENDANTS AND TO THEIR ATTORNEYS OF  
22 RECORD:

23 Plaintiff Innovative Sports Management, Inc. (hereinafter "Plaintiff"), by and through  
24 counsel, hereby opposes the Motion for Judgment on the Pleadings filed by Renzo Macchiavello,  
25 individually and d/b/a Renzo's Taste of Peru, and Macchiavello, LLC, an unknown business  
26 entity d/b/a Renzo's Taste of Peru (hereinafter "Defendants") (Dkt. No. 14). For the reasons set  
27 forth herein, Plaintiff respectfully requests that Defendants' Motion for Judgment on the  
28 Pleadings (hereinafter "Defendant's Motion) be denied.

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**MEMORANDUM OF POINTS AND AUTHORITIES**

**INTRODUCTION AND STATEMENT OF FACTS**

Plaintiff was granted the exclusive nationwide commercial distribution rights to the *CONCACAF World Cup Qualifier Tournament, including but not limited to Peru v. Chile*, telecast nationwide on Tuesday, October 11, 2011 (hereinafter the “Program”). Complaint ¶ 16 (Dkt. No. 1). Plaintiff’s distribution rights encompassed all undercard events as well as the main event. Id. Pursuant to the contract granting Plaintiff its distribution rights, Plaintiff entered into sub-licensing agreements with various commercial establishments to permit the public exhibition of the Program. Id. at ¶ 17. Plaintiff alleges that, without its authorization, Defendants unlawfully intercepted and exhibited the Program at their commercial establishment in Irvine, California. Id. at ¶ 19. Defendants have now moved for judgment on the pleadings.

**LEGAL STANDARD**

The standard on a Motion for Judgment on the Pleadings under Federal Rule of Civil Procedure 12(c) is the same as the standard for failure to state a claim under Federal Rule of Civil Procedure 12(b)(6). Dworkin v. Hustler Magazine, Inc., 867 F.2d 1188, 1192 (9th Cir. 1989). Rule 12(b)(6) examines the legal sufficiency of the facts alleged on the face of the plaintiff’s complaint. To survive a Rule 12(b)(6) motion to dismiss, a complaint must contain factual allegations sufficient “to raise a right to relief above the speculative level.” Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 555 (2007). In this regard, the Complaint must have “facial plausibility,” which exists “when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.” Aschcroft v. Iqbal, 556 U.S. 662, 678 (2009). The burden of establishing that they are entitled to judgment on the pleadings is on Defendants. JMP Securities LLP v. Altair Nanotechnologies Inc., 2012 WL 892157, \*7 (N.D.Cal. March 14, 2012).

## ARGUMENT

I. A MOTION FOR JUDGMENT ON THE PLEADINGS TESTS THE PLEADINGS AND DEFENDANTS' MOTION IS DEPENDENT UPON INFORMATION OUTSIDE OF THE PLEADINGS.

Federal Rule of Civil Procedure 7 defines the "pleadings" in Federal Court. Pursuant to Rule 7:

(a) Pleadings. *Only these pleadings are allowed:* (1) a complaint; (2) an answer to a complaint; (3) an answer to a counterclaim designated as a counterclaim; (4) an answer to a crossclaim; (5) a third-party complaint; (6) an answer to a third-party complaint; and (7) if the court orders one, a reply to an answer.

Fed.R.Civ.P. 7(a) (emphasis added). Under the Federal Rules a "pleading" is a term of art and comprise only those items listed in Federal Rule 7. Matranga v. Boyett Portable Restrooms, Inc., 2011 WL 7045237, \*1 (S.D.Ala. Sept. 22, 2011); Gevara v. Hubbard, 2010 WL 1233839, \*2 (M.D.N.C. March 23, 2010) ("Although the term 'pleading' is sometimes used loosely to refer to any filing in a court case, under the Federal Rules of Civil Procedure, 'pleading' is a term of art. Fed.R.Civ.P. 7(a).") (citations / quotations in original).<sup>1</sup>

Notwithstanding this, Defendants' Motion is based on information obtained from Plaintiff via Plaintiff's Federal Rule 26 Initial Disclosures. See Defendants' Motion, passim.<sup>2</sup> This information is not before the Court on a Motion for Judgment on the Pleadings, and the Court may not go beyond the pleadings when ruling on Defendants' Motion. See Hal Roach Studios, Inc. v. Richard Feiner & Co., 896 F.2d 1542, 1550 (9th Cir. 1989). In addition, this is not a case of Defendants simply referencing the wrong rule; to the contrary, Defendants acknowledge that they are *not* bringing their motion pursuant to Federal Rule of Civil Procedure 12(b)(1). Specifically, Defendants state:

<sup>1</sup> It is unclear from the Motion, which includes Defendants' repeated reliance on documents outside of the pleadings, whether Defendants are familiar with this definition.

<sup>2</sup> These Initial Disclosures are submitted with the Declaration of defense counsel Matthew A. Pare. (Dkt. No. 14-1).

1 Although Federal Rule of Civil Procedure 12(b)(1) contemplates a mechanism by  
 2 which a challenge to the subject matter jurisdiction can be raised, it is not the only  
 3 vehicle. In particular, Federal Rule of Civil Procedure 12(h)(3) states that “[i]f the  
 4 court determines *at any time* that it lacks subject-matter jurisdiction, the court  
 5 must dismiss the action.” (Emphasis added.) Therefore, this issue can be raised at  
 6 any time, and a motion for judgment on the pleadings is authorized by Federal  
 7 Rule of Civil Procedure 12(c) which provides that “[a]fter the pleadings are  
 8 closed—but early enough not to delay trial—a party may move for judgment on  
 9 the pleadings.”

10 Defendants’ Motion at 6 (underline emphasis added). In other words, Defendants make clear  
 11 that they are not challenging subject matter jurisdiction under Rule 12(b)(1) but, rather, via a  
 12 Motion for Judgment on the Pleadings under Federal Rule 12(c). While Defendants are correct  
 13 that they may raise a Federal Rule 12(c) Motion at this time, that does not mean Defendants  
 14 may go outside the pleadings and present evidence.

15 A. A Facial Challenge To Standing Has Been Rejected.

16 Although Defendants do not even attempt to challenge the pleadings, even assuming  
 17 *arguendo* they had, this argument has been rejected. In J & J Sports Productions, Inc. v.  
 18 Mendoza-Gowan, 2011 WL 1544886 (N.D.Cal. April 25, 2011), the Northern District addressed  
 19 an affirmative defense of standing. The Court rejected the defense:

20 Defendant's third affirmative defense alleges that “plaintiff lacks legal standing  
 21 (*contractual and statutory standing*) to pursue claims for alleged exhibition of the  
 22 Program or bring this Complaint and the claims asserted therein against  
 23 defendant” (Ans.2).

24 The complaint alleges that plaintiff has exclusive distribution rights to the  
 25 program, but defendant unlawfully intercepted its transmission and displayed it  
 26 without authorization. *Plaintiff has therefore adequately alleged standing.*

27 Id. at \*3 (emphasis added); see also J & J Sports Productions, Inc. v. Montanez, 2010 WL  
 28 5279907 (E.D.Cal. Dec. 13, 2010) (“Defendants' fifth affirmative defense states that Plaintiff is  
 not a person protected by any of the *statutory violations* alleged in the Complaint. . . . Plaintiff  
 alleges that it has the exclusive distribution rights to the Program and that Defendants  
 unlawfully intercepted and/or displayed the transmission of the Program without authorization.



1 Plaintiff has adequately alleged its standing to pursue this lawsuit.”) (emphasis added) (internal  
 2 quotation omitted); G & G Closed Circuit Events, LLC v. Nguyen, 2010 WL 3749284, \*4  
 3 (N.D.Cal. Sept. 23, 2010) (rejecting standing affirmative defense as legally insufficient).

4 B. Defendants Did Not Preserve The Issue Of Standing In The Pleadings.

5 While this Court may review subject matter jurisdiction at any time under Rule 12(b)(1),  
 6 as noted above, Defendants make clear that they do not base their Motion on Rule 12(b)(1), but  
 7 on Rule 12(c). Defendants’ Answer, filed on October 17, 2012, does not raise the defense of  
 8 standing. See Answer (Dkt. No. 4). As such, there is no pleading on which Defendants can base  
 9 their contention. Next, as a practical matter, Defendants’ Motion is based on what Defendants  
 10 speculate must be produced in discovery. Specifically, on page 12 of their Motion, Defendants  
 11 state:  
 12

13 One might ask the reasonable question as to how can defendants know that  
 14 Innovative Sports Management, Inc. did not fulfill its duties under the license  
 15 agreement. The answer is because no such documentation was produced by the  
 16 plaintiff Innovative Sports Management, Inc. with its Rule 26 initial disclosures  
 17 and there is an affirmative duty in federal litigation to make such a disclosure of  
 supporting evidence, even absent a specific discovery request. Federal Rule of  
 Civil Procedure 26(a)(1)(A).

18 Defendant’s Motion at 12. Defendants’ conclusion as to what they believe must be produced  
 19 under Federal Rule 26 is only that, *Defendants’* conclusion. Defendants offer no authority to  
 20 support what they believe must be produced under Rule 26. See Id. Pursuant to Federal Rule 26,  
 21 “a party must, without awaiting a discovery request, provide to other parties . . . all documents  
 22 . . . that the disclosing party may use to support its claims or defenses, unless solely for  
 23 impeachment.” Fed.R.Civ.P. 26(a)(1)(B). Even assuming a motion for judgment on the pleadings  
 24 could be granted on Defendants’ inferences, there is no inference to be drawn from the alleged  
 25 lack of “documentation.”  
 26

27 The burden on a Motion for Judgment on the Pleadings is on Defendants. As Defendants  
 28 do not so much as challenge the pleadings, they do not satisfy their burden. For this reason

1 alone, Defendants' Motion should be denied. Nonetheless, without waiving the above  
 2 arguments, Plaintiff will address the merits of Defendants' Motion below.

## 3 II. PLAINTIFF HAS CONSTITUTIONAL STANDING TO BRING ITS CLAIMS.

4 As an initial matter, Defendants are ambiguous as to the standing challenge they mount.  
 5 After defining the elements of Constitutional standing, Defendants state, "the notion of standing  
 6 can be further can be further limited as there are both Constitutional standing requirements as  
 7 well as prudential standing requirements (judicially self-imposed), in addition to statutory  
 8 standing requirements, and contractual standing requirements." Defendants' Motion at 6  
 9 (citations omitted). Defendants then state, "[t]hese other limits on standing are primarily the  
 10 basis (sic) upon which defendants bring their motion, as detailed *infra*." Id. (underline emphasis  
 11 added). The use of the word "other" suggests Defendants do not challenge Constitutional  
 12 standing; however, the use of the word "primarily" suggests that they may.

13  
 14 Ultimately, as Defendants do not return to the issue of Constitutional standing in their  
 15 Motion, it appears they do not mount a Constitutional challenge. Nonetheless, Plaintiff will  
 16 briefly address this issue. To establish Constitutional standing, the plaintiff must meet three  
 17 elements:  
 18

19 First, the plaintiff must have suffered an "injury in fact"-an invasion of a legally  
 20 protected interest which is (a) concrete and particularized . . . . Second, there must  
 21 be a causal connection between the injury and the conduct complained of-the  
 22 injury has to be fairly traceable to the challenged action of the defendant . . . .  
 Third, it must be likely, as opposed to merely speculative, that the injury will be  
 redressed by a favorable decision.

23 Lujan v. Defenders of Wildlife, 504 U.S. 555, 560–61 (1992) (internal quotations / citations  
 24 omitted). Plaintiff satisfies all three factors of the Lujan analysis. First, Plaintiff's claims are  
 25 concrete and particularized. Plaintiff's Complaint alleges the specific place at which Defendants  
 26 committed the violations, the specific date on which the violations occurred, the specific  
 27 Program unlawfully intercepted, that Defendants intercepted the Program with full knowledge  
 28

1 that they were unauthorized to do so, and that this was done for commercial advantage or  
 2 financial gain. See Complaint, passim.

3 Next, “the issue in the causation inquiry is whether the alleged injury can be traced to the  
 4 Defendants’ challenged conduct, rather than to that of some other actor not before the court.”  
 5 Ecological Rights Foundation v. Pacific Lumber Co., 230 F.3d 1141, 1152 (9th Cir. 2000).  
 6 Plaintiff alleges that the Program was broadcast at Defendants’ commercial establishment, and  
 7 that Defendants did not obtain the Program from Plaintiff. See Complaint ¶¶ 17-19. The alleged  
 8 injury can absolutely be traced to Defendants’ challenged conduct; there is certainly no “other  
 9 actor not before the court.” The fact that the Program is alleged to have been displayed at  
 10 Defendants’ commercial establishment, when coupled with the fact that Plaintiff was granted the  
 11 exclusive commercial distribution rights, defeats any contention that the injury in fact is not  
 12 “fairly traceable” to Defendants’ behavior. See Ecological Rights Foundation, 230 F.3d at 1152  
 13 (9th Cir. 2000) (“The causal connection put forward for standing purposes cannot be too  
 14 speculative, or rely on conjecture about the behavior of other parties, but need not be so airtight  
 15 at this stage of the litigation as to demonstrate that the plaintiffs would succeed on the merits.”).

16 Part three of the Lujan test presumes a favorable decision and simply asks whether  
 17 Plaintiff may be redressed. Because Plaintiff seeks monetary damages, it would be redressed by  
 18 a favorable decision. See In re VeriSign, Inc., 2005 WL 88969, \*5 (N.D.Cal. Jan. 13, 2005)  
 19 (Plaintiffs sought damages to redress their injuries and that was sufficient for standing); Fralin &  
 20 Waldron, Inc. v. Henrico County, Va., 474 F.Supp. 1315, 1321 (E.D.Va.1979).  
 21

22  
 23  
 24 III. DEFENDANTS’ OTHER STANDING ARGUMENTS FAIL AS THE  
 25 EVIDENCE PRESENTED BY DEFENDANTS DOES NOT SUPPORT  
 26 DEFENDANTS’ POSITION.<sup>3</sup>

27  
 28 <sup>3</sup> As noted in Section I, supra, Defendants misunderstand the nature of a Motion for Judgment on the Pleadings. Nonetheless, Plaintiff will address the merits of Defendants’ Motion.

Defendants refer generally to prudential, statutory and contractual standing requirements. Defendants' Motion at 6. Defendants, however, make no effort to specify what standing theory applies to what argument. It appears, however, that the argument in section I.B is a statutory standing argument (which is based on irrelevant statutes), and the argument in section I.D is a contractual standing argument.

A. Defendants' Exclusive Licensee Argument Ignores The Actual Statutes At Issue And Plaintiff Satisfies The Statutory Requirements Of 47 U.S.C. §§ 605 And 553.

Because they must for their arguments to have any relevance, Defendants conclude, without any legitimate basis or analysis, that this Court *must* follow Copyright Act and patent law cases and hold that Plaintiff does not have standing because it is not an exclusive licensee. In effect, Defendants contend that because Plaintiff does not satisfy the requirements for statutory standing *under the Copyright Act or under patent law*, it may not sue for a violation of 47 U.S.C. §§ 605 or 553. Of course, such a contention is untenable.<sup>4</sup>

Defendants state, “[i]n television signal piracy cases and intellectual property matters at large, there is a body of law which explains how a licensee must be the ‘exclusive’ licensee in order to have standing to sue (see cases cited *infra*).” Defendants' Motion at 6 (underline emphasis added). What Defendants do not tell the Court is that the cases to which they cite address requirements under 17 U.S.C. § 501(b) or 35 U.S.C. § 281, and are *not* television piracy cases. If there is a “*body*” of television signal piracy case law that hold what Defendants claim, it is astounding that Defendants do not cite to one such case.

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<sup>4</sup>Defendants’ “argument” makes no attempt to analyze or apply the cases they cite to the facts. Defendants present a quick synopsis of seven cases and then a narrative of the facts of this case. At no time do Defendants attempt to connect the holding of any particular case to the facts herein. This Court is not obligated to extrapolate a connection for them. See *Indep. Towers of Wash. v. Washington*, 350 F.3d 925, 929-30 (9th Cir. 2003) (the court cannot manufacture arguments for a party; only issues that are “argued specifically and distinctly” are considered.”).

Defendants cite to seven cases in Subsection II.B of their Argument. See Defendants' Motion at 7-8. Four of the seven cases relied upon by Defendant are Copyright Act cases. See Defendants' Memorandum at 7, citing Nafal v. Carter, 540 F.Supp.2d 1128 (C.D.Cal. 2007); Althin CD Medical, Inc. v. West Suburban Kidney Center, S.C., 874 F.Supp. 837 (N.D.Ill. 1994); HyperQuest, Inc. v. N'Site Solutions, Inc., 632 F.3d 377 (7th Cir. 2011); Righthaven LLC v. Hoehn, 716 F.3d 1166, 1169 (9th Cir. 2013). All of these cases involved an interpretation of Copyright statutes and a determination of whether there was statutory standing under 17 U.S.C. § 501(b) or its predecessor. Nafal, 540 F.Supp.2d at 1137-38; Althin CD Medical, Inc., 874 F.Supp. at 842; HyperQuest, Inc., 632 F.3d at 381; Righthaven, LLC, 716 F.3d at 1169.

The other three cases cited by Defendants, AsymmetRx, Inc. v. Biocare Medical, LLC, 582 F.3d 1314 (Fed. Cir. 2009), Propat Intern. Corp. v. Rpost, Inc., 473 F.3d 1187 (Fed. Cir. 2007), and Pfizer, Inc. v. Elan Pharmaceutical Research Corp., 812 F.Supp. 1352 (D.Del. 1993) were patent infringement cases. These cases involved a determination of whether there was statutory standing under 35 U.S.C. § 281. AsymmetRx, Inc., 582 F.3d at 1318; Propat Intern. Corp., 473 F.3d at 1189; Pfizer, Inc., 812 F.Supp. at 1370.

In Righthaven<sup>5</sup>, the Ninth Circuit held, “[u]nder the Copyright Act, only the “legal or beneficial owner of an exclusive right under a copyright” has standing to sue for infringement of that right. *See* 17 U.S.C. § 501(b)[.]” Id. at 1169 (citation in original, further citation omitted). Specifically, 17 U.S.C. § 501(b) provides:

The legal or beneficial owner of an *exclusive right* under a copyright is entitled, subject to the requirements of section 411, to institute an action for any infringement of that particular right committed while he or she is the owner of it.

17 U.S.C. § 501(b) (emphasis added).

<sup>5</sup> While Righthaven LLC is the last case cited by Defendants, it is the most recent case decided (May 9, 2013).

To the contrary, 47 U.S.C. 605 provides that, “[a]ny person aggrieved...may bring a civil action in a United States district court or in any other court of competent jurisdiction.” 47 U.S.C. § 605(e)(3)(A) (emphasis added). Similarly, 47 U.S.C. § 553 provides that, “[a]ny person aggrieved by any violation of subsection (a)(1) of this section may bring a civil action in a United States district court or in any other court of competent jurisdiction.” 47 U.S.C. § 553(c)(1) (emphasis added). Section 605 further clarifies that, “the term ‘any person aggrieved’ shall include any person with proprietary rights in the intercepted communication by wire or radio[.]” 47 U.S.C. § 605(d)(6) (emphasis added).<sup>6</sup> As a practical matter, it has routinely been held that parties akin to Plaintiff is an “aggrieved party” under the piracy statutes. E.g. J & J Sports Productions, Inc. v. Delgado, 2012 WL 371630, \*3 (E.D.Cal. Feb. 3, 2012); Directv v. Budden, 420 F.3d 521, 525-28 (5th Cir. 2005) (discussing broad and “enlarged” scope of aggrieved party under 47 U.S.C. § 605); J & J Sports Productions, Inc. v. Rezndiz, 2008 WL 5211288, \*2 (N.D.Ill. Dec. 9, 2008) (finding plaintiff to be an aggrieved party under 47 U.S.C. § 553); Joe Hand Promotions, Inc. v. Caddyshanks, LLC, 2013 WL 869527, \*3 (M.D.Fla. March 7, 2013) (47 U.S.C. § 553 confers standing on any person who is aggrieved because of the unauthorized interception).

In J & J Sports Productions, Inc. v. Mandell Family Ventures, LLC, 2012 WL 4757694 (N.D.Tex. Oct. 5, 2012), the district court succinctly summarized that a commercial licensor of sports programming like Plaintiff has statutory standing:

Since J & J Sports was the exclusive licensee of the distribution rights to the Event, J & J Sports is an “aggrieved person” under the statute and can bring a private right of action for either actual damages or statutory damages for each violation. *See* 47 U.S.C. §§ 553(c)(1) & (3)(A); 605(d)(6) & (e)(3)(C)(I)[.]

Id. at \*3 (citations in original).

<sup>6</sup> Section 553 does not define “aggrieved party”; however, in light of the significant overlap between sections 553 and 605, the definition from section 605 is instructive

1 In interpreting a statute, “the first step is to determine whether the language at issue has  
2 a plain and unambiguous meaning with regard to the particular dispute in the case.” Barnhart v.  
3 Sigmon Coal Co., 534 U.S. 438, 450 (2002) (internal quotations omitted). If the language is  
4 unambiguous, the inquiry ceases. Id. Here, the unambiguous language in both 47 U.S.C. § 605  
5 and 47 U.S.C. § 553 makes clear that Plaintiff has statutory standing. Ultimately, Defendants  
6 would have this Court ignore the language of 47 U.S.C. §§ 605 and 553 in favor of case law  
7 interpreting copyright and patent law. Of course, Defendants offer no authority for such a  
8 proposition.  
9

10 Defendants “anticipate” that Plaintiff will distinguish the cases to which they cite, and in  
11 an effort to head this off, argue that courts have borrowed Copyright Act analysis in addressing  
12 other issues. See Defendants’ Motion at 10. The fact that Defendants acknowledge this in  
13 advance does not make their arguments any more sound. More importantly, the simple fact that  
14 certain courts have analogized the piracy act statutes to the Copyright Act in certain contexts  
15 does not make such an approach valid when the express language of 47 U.S.C. §§ 605 and 553  
16 and case law directly addressing standing thereunder contradicts Defendants’ basic premise.  
17

18 For example, Defendants note that certain courts have applied the Copyright Act statute  
19 of limitations to claims under 47 U.S.C. §§ 605 and 553. See Defendants’ Motion at 10  
20 (citations omitted). While this is correct, other Courts, including the Ninth Circuit in Directv v.  
21 Webb, 545 F.3d 837 (2007), have not. The simple explanation for this is that neither 47 U.S.C.  
22 §§ 605 or 553 contain a statute of limitations, see Webb at 847, and thus it is necessary to do  
23 such an analysis. To the contrary, 47 U.S.C. §§ 605 and 553 establish the requirements of  
24 statutory standing.  
25

26 ///

27 ///



1                   1.       Plaintiff Was Granted the Right to Pursue Claims for Piracy.<sup>7</sup>

2                   Setting the above aside, Plaintiff was granted the exclusive rights it seeks to enforce. As  
 3                   noted in the Event Distribution Agreement, Plaintiff (“Distributor” under the Event Distribution  
 4                   Agreement”) was tasked with “tak[ing] appropriate measures to prevent misappropriation or  
 5                   unauthorized use of the event and all rights associated therewith[.]” Event Distribution  
 6                   Agreement at 3.<sup>8</sup> While Plaintiff submits that this paragraph is clear on its face and  
 7                   unequivocally establishes that it is Plaintiff (i.e., Distributor) that is responsible for addressing  
 8                   piracy, Plaintiff will nonetheless refute Defendants’ narrow reading of the provision. Because  
 9                   they must for their arguments to have any validity, Defendants focus on the word “prevent” and  
 10                  construe this provision to mean that Plaintiff only has the authority to take action *prior* to an act  
 11                  of piracy. See Defendants’ Motion at 10. Specifically, Defendants state, “[i]n other words, the  
 12                  licensee was to help prevent misappropriation, not try to sue people after an alleged  
 13                  misappropriation.” Id. (emphasis added).

14                  There are two major deficiencies with this argument. First, it flouts the plain language of  
 15                  the contract. Plaintiff was tasked with taking “appropriate measures to prevent misappropriation  
 16                  or unauthorized use.” Event Distribution Agreement at 2. There are no restrictions on the *types*  
 17                  of measures Plaintiff may take. Certainly, Defendants (and in particular defense counsel, who  
 18                  routinely holds himself out as an expert in piracy litigation), will not argue that the filing of  
 19                  lawsuits is not a preventative measure against future piracy. Indeed, one of the stated purposes  
 20                  of the damages provisions of the piracy statutes is deterrence against future piracy. See J & J  
 21                  Sports Productions, Inc. v. Marcaida, 2011 WL 2149923, \*4 (N.D.Cal. May 31, 2011) (“[T]he

22  
 23  
 24  
 25  
 26                  <sup>7</sup> While Plaintiff acknowledges that there has been some inconsistency in the names by which Plaintiff has identified  
 27                  itself, the *corporate* name is Innovative Sports Management, Inc., and the company does business as Integrated  
 28                  Sports Media. Jacobs Declaration ¶ 4. Innovative Sports Management, Inc., Plaintiff herein, entered into the Event  
 Distribution Agreement at issue. Id. ¶ 5.

<sup>8</sup> A copy of this Agreement is attached to the Declaration of Matthew A. Pare at pages 16-20.



1 Court notes that signal piracy is a pervasive and increasing problem and that a primary purpose  
 2 of § 605 is to deter such conduct. . . .”). This sends a signal to potential pirates that they will be  
 3 prosecuted. Under Defendants’ rationale, if Plaintiff does not stop piracy *in advance* it has no  
 4 recourse. There is nothing in the Event Distribution Agreement to support such a construction.

5 Next, at best, Defendants have established that there is an ambiguity in the contract with  
 6 respect to who may pursue claims for piracy. Contrary to Defendants’ unequivocal statement  
 7 that “Al Jazeera Media Network did not relinquish its rights to pursue litigation and control that  
 8 litigation,” Defendants’ Motion at 10, there is nothing in the Event Distribution Agreement that  
 9 says this. Nonetheless, Plaintiff has submitted the Declaration of Doug Jacobs, President of  
 10 Innovative Sports Management, Inc., which clarifies that Plaintiff and Plaintiff *alone* was  
 11 authorized and obligated to pursue claims of piracy. Jacobs Declaration ¶ 7.

12 Defendants also make reference to an “extremely significant” other provision of the  
 13 Event Distribution Agreement that flatly misreads the provision. See Defendants’ Motion at 10,  
 14 quoting Event Distribution Agreement at 3. The provision in question states:

15 Distributor hereby recognizes and agrees that all copyrights, trademarks, trade  
 16 names and other rights associated with the Event and the Event itself  
 17 (collectively, the “Property”) are and shall remain the sole and exclusive property  
 18 of SF, and Distributor shall not have any *right to use the Property except as*  
 19 *herein agreed.*

20 Event Distribution Agreement at 3 (emphasis added). While it is true that Al Jazeera Media  
 21 Network (hereinafter “Al Jazeera”) retained copyrights, etc. for uses *other* than those addressed  
 22 in the Event Distribution Agreement (i.e., the rights conferred on Plaintiff), that is irrelevant to  
 23  
 24  
 25  
 26  
 27  
 28

1 this cause of action. This cause of action involves rights that were conferred on Plaintiff.<sup>9</sup>

2 IV. DEFENDANTS HAVE NO RIGHT TO CHALLENGE THE CONTRACT.

3 In effect, the arguments Defendants raise are tantamount to those that may be raised by a  
4 third-party beneficiary to a contract. Defendants, however, are not in such a position and have no  
5 standing to challenge the contract. In re Porter's Estate, 142 N.Y.S. 2d 787, 789 (N.Y. Sur. 1955)  
6 ("Before such beneficiaries have a right to enforce the original contract it most clearly appears  
7 that the contract was made and intended for their benefit."). There was no intent by the parties to  
8 the contract to benefit any third party. While this is clear from the language of the Event  
9 Distribution Agreement itself, to the extent there is any ambiguity, this is also confirmed by Mr.  
10 Jacobs. Jacobs Declaration ¶ 6.

12 Next, as a practical matter, even if Defendants were third-party beneficiaries, a third-  
13 party beneficiary who seeks to enforce a contract does so subject to the defenses that would be  
14 valid as between the parties. See Hanrihan v. Parker, 19 Misc.2d 467, 469 (N.Y.Sup. 1959) ("a  
15 suit in contract by an alleged third-party beneficiary is subject to the same defenses as a suit by a  
16 contracting party."); Gennett v. Smith, 244 A.D.3d 5 (N.Y.A.D. 3d Dept. 1935) ("the third party  
17 cannot acquire a better right against the promisor than the promisee himself had."); cf. TPZ

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20 <sup>9</sup> Defendants also note the requirement that written notification be made to Al Jazeera. Defendants' Motion at 10;  
21 Event Distribution Agreement at 2. As evidenced by the agreement itself, there is no specific method by which this  
22 must be accomplished, nor is there any time frame (other than that notification should be prompt). See Id. As a  
23 practical matter, even if the arguments Defendants present were valid on their face, they are academic as the parties  
24 to the contract (i.e., Integrated Sports Management, Inc. and Al Jazeera Media Network) have manifested an  
25 intention to waive compliance with the requirement of written notification. Parties to a contract may waive a  
26 provision in the contract if evidence demonstrates that was the parties' intent; this may be demonstrated by the  
27 parties' course of conduct. See TPZ Corp. v. Dabbs, 25 A.D.3d 787, 791 (N.Y.A.D. 2d Dept. 2006); see 17A C.J.S.  
28 Contracts § 375, t. 425 (1963) ("While one party to a contract cannot alter its terms without the assent of the other  
parties, the fact of agreement may be implied from a course of conduct in accordance with its existence."). [The  
Event Distribution Agreement is governed by the laws of New York. Event Distribution Agreement at 5.] Plaintiff  
has submitted the Declaration of Doug Jacobs, President of Innovative Sports Management, Inc., who testifies that  
"a custom developed between Innovative Sports Management, Inc. and Al Jazeera whereby it was intended,  
understood, and agreed that strict compliance via written notification of piracy would not be necessary." Jacobs  
Declaration ¶ 8. Al Jazeera has never objected to this course of conduct and, Innovative Sports Management, Inc.  
has relied upon this course of conduct. Id. ¶ 9.

1 Dabbs, 25 A.D.3d at 792-93 (“It is elementary ancient law that an assignee never stands in any  
2 better position than his assignor”). In that regard, for Defendants’ argument to succeed, they  
3 would need to establish that Al-Jazeera agrees with them. Setting aside whether this is plausible,  
4 there is certainly no evidence to support such a conclusion.

5 Defendants contend that this Court may consider their argument. Defendants’ Motion at  
6 11. In support of this, however, Defendants cite to three cases, two of which, as they note, were  
7 cited in J & J Sports Productions, Inc. v. Kurz, Ltd., 2009 WL 1886124, \*10 (E.D.Pa. June 30,  
8 2009). Id. (citations omitted). Two pages later, Defendants state that Kurz is distinguishable and  
9 that this is an issue of first impression in this Court. See Id. at 13-14.<sup>10</sup> Defendants cannot have it  
10 both ways.  
11

12 Finally, notwithstanding all of the above, even if the Defendants could enforce the  
13 clauses on which they purport to rely, this is not a jurisdictional defect, and therefore, it can be  
14 cured. Cf. Rutter v. Carroll's Foods of the Midwest, Inc., 50 F. Supp. 2d 876, 882-883 (N.D.  
15 Iowa 1999) (superseded by statute) (Finding a “mediation release is a ‘condition precedent’ to  
16 suit, not a jurisdictional prerequisite. As such, the defect of failing to obtain such a release does  
17 not affect the claimant's standing or the subject matter jurisdiction of the court, but is instead  
18 curable after suit has been filed.”).

20 V. PLAINTIFF SHOULD BE GRANTED LEAVE TO AMEND ITS COMPLAINT.

21 If this Court is inclined to grant Defendants’ Motion, this Court should grant Plaintiff  
22 leave to amend its Complaint to cure any deficiencies therein. Pursuant to Federal Rule of Civil  
23 Procedure 15(a), leave to amend a complaint should be freely given “when justice so requires.”  
24

25  
26 <sup>10</sup> Defendants’ argument that Kurz (as well as another Eastern District of Pennsylvania case, J & J Sports  
27 Productions, Inc. v. Baylor, Case No. 5:13-cv-02483-JS (E.D.Pa. July 25, 2013, Dkt. No. 16)), are distinguishable is  
28 ultimately dependent on Defendants’ misunderstanding of what a “pleading” is. See Defendants’ Motion at 13.  
Finally, Plaintiff notes that in both cases a similar motion was denied. See Kurz, 2009 WL 1886124 at \*10-11;  
Baylor at \*2.

1 Fed.R.Civ.P. 15(a); See Foman v. Davis, 371 U.S. 178, 182 (1962). The Court may grant leave  
 2 to amend if it grants a Motion for Judgment on the Pleadings. Alatorre v. Wastequip Mfg. Co.  
 3 LLC, 2013 WL 796717, \*2 (E.D.Cal. March 4, 2013) (“Although Rule 12(c) does not mention  
 4 leave to amend, courts have the discretion in appropriate cases to grant a Rule 12(c) motion with  
 5 leave to amend[.]”)

6 Defendants contend that this case presents an issue of “first impression.” Defendants’  
 7 Motion at 14. Given the novelty of the issue, Plaintiff should be afforded the opportunity to  
 8 conform its pleadings to any additional requirements. Finally, there have been no prior  
 9 amendments herein.

### 11 CONCLUSION

12 Defendants’ Motion is procedurally deficient as it relies on matters outside the pleadings.  
 13 Moreover, Defendants’ substantive arguments fail as Defendants rely upon inapposite case law  
 14 and have no right to challenge the contract between Plaintiff and Al Jazeera. Finally, even if  
 15 Defendants’ arguments were otherwise valid, there has been no breach of the parties’ contract.

17  
 18 WHEREFORE, for the reasons set forth herein, Plaintiff respectfully requests that  
 19 Defendants’ Motion for Judgment on the Pleadings be denied or, in the alternative, if this Court  
 20 grants Defendants’ Motion that Plaintiff be granted leave to amend, and that Plaintiff be awarded  
 21 such other relief as may be just and proper.

22 Respectfully submitted,

23  
 24  
 25 Dated: September 10, 2013

/s/ Thomas P. Riley

**LAW OFFICES OF THOMAS P. RILEY, P.C.**

By: Thomas P. Riley

Attorneys for Plaintiff

Innovative Sports Management, Inc.

**PROOF OF SERVICE**

I declare that:

I am employed in the County of Los Angeles, California. I am over the age of eighteen years and not a party to the within cause; my business address is First Library Square, 1114 Fremont Avenue, South Pasadena, California 91030. I am readily familiar with this law firm's practice for collection and processing of correspondence/documents for mail in the ordinary course of business.

On September 10, 2013, I caused to serve the following documents entitled:

PLAINTIFF'S OPPOSITION TO DEFENDANTS' MOTION FOR JUDGMENT  
ON THE PLEADINGS; MEMORANDUM OF POINTS AND AUTHORITIES

On all parties referenced by enclosing a true copy thereof in a sealed envelope with postage prepaid and following ordinary business practices, said envelope was addressed to:

Matthew A. Pare, Esq.  
LAW OFFICE OF MATTHEW PARE  
303 H Street, Suite 435  
Chula Vista, CA 91910

The fully sealed envelope with pre-paid postage was thereafter placed in our law firm's outbound mail receptacle in order that this particular piece of mail could be taken to the United States Post Office in South Pasadena, California later this day by myself (or by another administrative assistant duly employed by our law firm).

I declare under the penalty of perjury pursuant to the laws of the United States that the foregoing is true and correct and that this declaration was executed on September 10, 2013, at South Pasadena, California.

Dated: September 10, 2013

/s/ Vanessa Morales  
VANESSA MORALES